29

Office - Supreme Court, U. S.
FILED
JUL 13 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

October TERM, 1942

ELIZABETH LIGGETT KENNARD,
Respondent,
v.
ELLA L. WIGGINS,
Petitioner.

No. 224

BRIEF FOR PETITIONER, SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, DIVISION 1.

HARRY W. KROEGER,
DANIEL N. KIRBY,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Opinions below 1

Jurisdiction 2

Statement 3

The primary question presented..... 3

Specifications of error 4

Argument 6

Point I. The supreme court of Missouri (Division One) denied to Petitioner the due process of law guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motion that said Division One transfer the instant case to said entire court (composed of seven judges), which transfer was mandatory under the Constitution of Missouri, Article VI; Section 4 of Amendment of 1890, Rev. Stats. of Mo., Vol. I, page 127c, in cases when "a federal question is involved"..... 6

Point II. Even if there had been fraud in the will construction case, as alleged in the petition in the instant suit, Respondent had no right under Missouri law to a decree, because she neglected during the three-year period after she became twenty-one years old, to sue out of the state supreme court a writ of error to obtain a review of the state courts' decision in the will construction case (under Sections 1200 and 1202, Rev. Stats. Mo. 1939), issuable as "of course", being "a writ of right" 8

Point III. The state supreme court's decision that the pleadings and proof amply support the judgment below against Mrs. Wiggins is not sup-

ported by any substantial evidence, and, being wholly arbitrary, it unlawfully deprives Mrs. Wiggins of her property without due process of law, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States 13

Point IV. Said court denied to Petitioner such "due process of law";

(1) By arbitrarily and unjustly penalizing her by its instant decision and judgment, for the acts of the attorney for the Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state circuit court to construe the will in harmony with said affirmative contention,—acts for which Petitioner was not responsible in any way;

(2) By arbitrarily and unjustly penalizing her for the long delay that was caused chiefly by Respondent's having neglected to sue out a writ of error within the time allowed by statute and was also caused by the institution and prosecution of said futile litigation in the nunc pro tunc case, and in the two McIntosh suits in the federal courts; and

(3) By arbitrarily and unlawfully holding, contrary to the law and the undisputed evidence, that said guardian ad litem of Mrs. Kennard, by his attorney, in making said affirmative defense, "went beyond any authority he had" and thereby caused a decree to be entered which limited her "rights" and by thereupon treating said holdings as a basis for the instant decision against Mrs. Wiggins..... 26

Point V. The raising of the federal question was timely, although not raised until the case reached the state supreme court 32

Conclusion 35

Cases Cited.

Aden v. Dalton, 341 Mo. 454, at 467; 107 S. W. 2d 1070, at 1077 32
Anderson v. Biddle, 9 Mo. 580 (1845) 12
Cantwell v. Johnson, 236 Mo. 575, at 600, 601; 139 S. W. 365, at 374 ..... 9, 14
De La Vergne Ref. Mach. Co. v. Featherstone, 147 U. S. 209, at 222; 37 L. Ed. 138, at 142 35
Fiene v. Kirchoff, 176 Mo. 516, at 522, 526-527; 75 S. W. 608, at 609-611 28
First National Bank & Trust Co. v. Bowman, 322 Mo. 654, at 674; 15 S. W. 2d 842, at 852 17
Giozza v. Tiernan, 148 U. S. 657, at 662; 37 L. Ed. 599, at 601 12
Gorman v. Washington University, 62 Sup. Ct. Rep. 962, at 963 7
Harburg v. Arnold, 87 Mo. App. 326 12
Kennard v. Wiggins, 160 S. W. 2d 706, at 709 ..... 1, 2
Knox County v. Harshman, 133 U. S. 152, at 154; 33 L. Ed. 586, at 588 ..... 9, 10
McIntosh v. Wiggins, 123 F. 2d 316, at 319, 321, 321-322, 322; certiorari denied March 2, 1942, 62 S. Ct. 800; rehearing denied March 30, 1942, 62 S. Ct. 914 ..... 13, 18, 21, 25, 31
Marshall v. Holmes, 141 U. S. 589, at 596; 35 L. Ed. 870, at 873 10
Missouri ex rel. Mo. Ins. Co. v. Gehner, 281 U. S. 313, at 319-320; 74 L. Ed. 870, at 875, 876 34
Moore v. State of Missouri, 159 U. S. 673, at 680; 40 L. Ed. 301, at 304 8

Padgett v. Smith, 205 Mo. 122 12
Perkins v. St. L. K. C. & Col. R. R. Co., 143 Mo. 513, at 519; 45 S. W. 260, at 261 9
Saunders v. Shaw, 244 U. S. 317, at 320; 61 L. Ed. 1163, at 1165, 1166 34
Scott v. McNeal, 154 U. S. 34, at 45; 38 L. Ed. 896, at 901 ..... 8, 12
Spotts v. Spotts, 331 Mo. 917, at 921, 924, 930-931, 931, 932; 55 S. W. 2d 977, at 978, 980, 983, 983-984 ..... 9, 12, 28
U. S. v. Throckmorton, 98 U. S. 61, at 68; 25 L. Ed. 93, at 96 14
Wiggins v. Perry, 119 S. W. 2d 839, at 844 25
Wiggins v. Perry, 271 S. W. 815, at 819, 821, 826 ..... 17, 22

Statutes Cited.

Section 1 of Amendment XIV to the Constitution of the United States 4, 6, 13, 26
Section 4, of Amendment of 1890, to Article VI of the Constitution of Missouri; Rev. Stats. of Mo., Vol. I, page 127c 4, 6
Section 237 (b) of the Judicial Code, as amended by the "Act of February 13, 1925", C. 229, § 1, 43 Stat. 937 (28 U. S. C. A., § 344) 2
Section 240 of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 8 (a, b, d), 43 Stat. 940 (28 U. S. C. A., § 350) 2
Section 563, Revised Statutes of Missouri, 1939 34
Section 1200, Revised Statutes of Missouri, 1939 ..... 4, 8
Section 1202, Revised Statutes of Missouri, 1939 ..... 4, 8
Section 3500, Revised Statutes of Missouri, 1939 34

Text Cited.

34 C. J., Section 782, p. 945 9

Rule of Court Cited.

Rule 38 of the Supreme Court of the United States ... 2

IN THE

SUPREME COURT OF THE UNITED STATES.

October TERM, 1942

ELIZABETH LIGGETT KENNARD,
Respondent,

v.

ELLA L. WIGGINS,
Petitioner.

No. .....

BRIEF FOR PETITIONER, SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, DIVISION 1.

OPINIONS BELOW. The circuit court, City of St. Louis, did not render an opinion, but on February 4, 1940, entered its decree embodying its findings therein, (R. 69-91). The general nature of said decree has been stated in the accompanying Petition for a writ to which reference is made.

The third and final (second modified) opinion of the supreme court of Missouri on the appeal of Petitioner from said decree, is reported as *Kennard v. Wiggins*, in

160 S. W. 2d 706. The points decided and judgment rendered are explained in the "Statement" portion of said Petition.

In the companion case, *McIntosh v. Wiggins*, the District Court of the United States handed down no opinion, but announced and filed its Findings of Fact and Conclusions of Law, with Directions for Judgment in favor of Mrs. Wiggins. The opinions (majority and minority) of the United States Circuit Court of Appeals, Eighth Circuit, on Mrs. McIntosh's appeal in said cause, are reported as *McIntosh v. Wiggins*, in 123 F. 2d 316.

JURISDICTION. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 1, 43 Stat. 937 (28 U. S. C. A., § 344); also under Section 240 of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 8 (a, b, d), 43 Stat. 940 (28 U. S. C. A., § 350), and under Rule 38 of this Court.

The final decision of said Supreme Court of Missouri, Division One, was rendered on February 26, 1942 (R. 392). A motion for rehearing, and a motion to transfer said cause to said Supreme Court of Missouri in banc, were duly filed by Mrs. Wiggins on March 7, 1942 (R. 405), and overruled by said Supreme Court of Missouri, Division One, on April 16, 1942 (R. 441).

The judgment of the Supreme Court of Missouri, Division One, was rendered July 25, 1941 (R. 243), coincident with the filing of its first opinion; said judgment was not changed by its two later (modified) opinions (decisions). Its three opinions (decisions) were rendered: July 25, 1941, (R. 243-254); December 16, 1941, (R. 351-363); and February 26, 1942, (R. 392-405),—respectively. Petitioner's motions for rehearing and to modify said original opinion are at R. 255-288; they were overruled on December 16,

1941, (R. 351). Her motions for rehearing and to transfer to the court in banc, as to the first modified opinion, are at R. 365-380; they were overruled on February 26, 1942, (R. 392-393). Her motions for rehearing and to transfer to the court in banc, as to the second modified (or final) opinion, are at R. 406-434; they were overruled on April 16, 1942, (R. 440-441).

STATEMENT. A "Statement of the case" was made in the accompanying Petition for a writ, to which, for brevity here, reference is made.

The primary question presented. In 1923, the circuit court of the City of St. Louis entered a decree (construing the Liggett will) which expressly vested in Mrs. Wiggins, as a life tenant, the trust income here in dispute. Upon appeal from said decree to the Supreme Court of Missouri, the particular paragraph of said decree (in dispute in the instant case) that vested such rights, was not presented for review by any party to the case, except to the extent that Mrs. Wiggins in claiming a fee simple title to her one-third of the trust property, made contentions completely hostile to the existence of any life estate. Upon said appeal, the Supreme Court of Missouri, Division One, did not specifically rule upon said disputed paragraph, but by its affirmance left said decree of the circuit court in full force and effect. In the instant case said disputed paragraph in said 1923 decree is sought to be avoided on behalf of Mrs. Kennard, upon the theory of fraud, accident or mistake committed by Mrs. Wiggins, and the circuit court in 1940, entered its decree avoiding said paragraph. Upon review of said decree in the instant case by the Supreme Court of Missouri, Division One, it found that no actionable fraud, accident or mistake had been committed by anyone, but affirmed the vacation of the disputed paragraph upon the theory that Mrs. Kennard's guardian ad litem had committed an un-

authorized act in the will construction suit,—in which act Mrs. Wiggins in no way participated. It is contended that said supreme court thereby attempted to deprive Mrs. Wiggins of income vested in her by the decree of 1923, for no wrong committed by her.

So the primary question here presented, is whether the divestiture of Mrs. Wiggins' rights under the prior decree, by a subsequent decree based upon no wrong committed by her, constitutes a taking of property without the due process of law guaranteed to her by Section 1 of Amendment XIV to the Constitution of the United States and thereby unlawfully deprived her of property decreed to be hers by said will construction decree.

Specifications of Error. 1. The Supreme Court of Missouri, Division One, erred in denying to Petitioner the due process of law guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motions that said Division One transfer the instant case to said entire court (in banc), as required by the Constitution of Missouri, Article VI; Section 4 of Amendment of 1890; R. S. Mo. 1939, Volume I, page 127c, in cases "when a federal question is involved."

2. Said state supreme court erred in denying Petitioner such due process of law, by failing to sustain her contention, supported by the established doctrine of said court and of this Court, that even if Petitioner had been guilty of the alleged fraud in said state courts, Respondent could not recover against Petitioner in this direct attack in equity to have the disputed paragraph of the will construction decree held void, because Respondent had completely neglected to avail herself of the prompt, available and adequate other remedy provided by the statutes of Missouri (Sections 1200 and 1202, R. S. Mo. 1939), by suing out a writ of error from said state supreme court within three years after she became twenty-one years old, by

which writ she could have obtained complete relief from the alleged consequences of such alleged fraud, by having the decree corrected if wrong, and if prejudicial to Respondent.

3. Said state supreme court erred in denying to Petitioner due process of law, by holding and adjudging that the pleadings and proofs in the instant case "amply support the judgment below", and accordingly by affirming the decree herein of the state circuit court in favor of Respondent and against Petitioner, although said decision was not supported by any substantial evidence as against Petitioner, and being wholly arbitrary as to her, unlawfully deprived her of her property without due process, in violation of the due process clause of the Amendments to the Constitution of the United States.

4. Said state supreme court erred in denying to Petitioner due process of law: (1) by arbitrarily and unjustly penalizing her by its decision and judgment, for the acts of the attorney for Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state court to construe the will in harmony with said contention—acts for which Petitioner was not responsible in any way; (2) by arbitrarily and unjustly penalizing Petitioner for the long delay caused chiefly by Respondent's having neglected to sue out a writ of error within the time allowed by state statute, and also caused by said act of the attorney for Respondent's guardian in making on her behalf the above-mentioned affirmative defense; and (3) by arbitrarily and unlawfully holding contrary to the law and the undisputed evidence, that said guardian ad litem of Mrs. Kennard, by his attorney, in making said affirmative defense "went beyond any authority he had" and thereby "caused a decree to be entered which limited" her "rights," and by thereupon treating said holdings as a basis for the instant decision against Mrs. Wiggins.

ARGUMENT.

Point I. The Supreme Court of Missouri (Division One) denied to Petitioner the due process of law guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motion that said Division One transfer the instant case to said entire court (composed of seven judges), which transfer was mandatory under the Constitution of Missouri, Article VI; Section 4 of Amendment of 1890; Rev. Stats. of Mo., Vol. I, page 127c, in cases when "a federal question is involved."

Said state constitutional provision (copied in said Petition), made it mandatory on said Division One, and thereby gave Petitioner the right as of course and as a fixed part of state procedure and of "the law of the land," to have said entire court hear and decide the appeal in the instant case because a federal question was involved and presented by said motion (R. 377-379, 380).

That said motion to transfer was timely, is shown later herein.

By denying said motion, Division One deprived Petitioner of the opportunity to brief and argue the instant case *de novo* before the seven judges of the court in banc. That this opportunity had legal substance and public importance is demonstrated by the existence in the state constitution of a provision granting it as a matter of "right" rather than of judicial discretion. That the opportunity had actual substance is shown, we submit, by the record fact that Division One was so uncertain of the factual and legal grounds of its decision, that the court found it necessary to render three different opinions before it reached its final grounds. In the two modified opinions, the court made changes in at least two of the substantial provisions or grounds of its original opinion. Although, as of record, said modifications were made of the court's "own motion", in fact they were made coincident with the over-

ruling of motions for rehearing which had challenged said portions of its earlier opinions.

In denying Petitioner's motion to transfer, the court announced no reasons for said denial.

In *Gorman v. Washington University*, 62 Sup. Ct. Rep. 962, at 963, this Court recently decided that:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari, *until the possibilities afforded by state procedure for its decision by all state tribunals had been exhausted.*" (Citing cases.)

In the same case this Court decided, in dismissing a petition for a writ of certiorari to review a decision of Division One of the Supreme Court of Missouri, that for the purpose of considering such a petition, the Court could not under the Judiciary Act, recognize a decision of a division of the supreme court of Missouri as constituting the decision of the highest court of Missouri, because such decision "could be set aside by the court sitting en banc"; (62 Sup. Ct. Rep. at 963).

While above case differs from the instant one in that no motion to transfer was made by Gorman, whereas in the instant case motions to transfer were made by Mrs. Wiggins and denied, the decision is relevant to show that the denial by said Division One, of Petitioner's motions to transfer would operate, if said denial were held to be conclusive on this Court, to bar Petitioner from the further right, this time granted under the Federal Constitution, to have this Court consider and decide under its writ of certiorari, whether a federal question is involved in the instant case.

It is settled that upon a writ of error to review the judgment of the highest court of the state upon the ground

that it was against a right claimed under the Constitution of the United States, this Court is not bound by the state's construction of a state statute, but must decide for itself its true meaning in order to decide the federal question; *Scott v. McNeal,* 154 U. S. 34, at 45; 38 L. Ed. 896, at 901.

For the above reasons, supplemented by the fact that they seem distinguishable upon the facts, it is submitted that the case of *Moore v. State of Missouri,* 159 U. S. 673, at 680; 40 L. Ed. 301, at 304, and later cases following it, are not in point.

Point II. Even if there had been fraud in the will construction case, as alleged in the petition in the instant suit, Respondent had no right under Missouri law to a decree, because she neglected during the three-year period after she became twenty-one years old, to sue out of the state supreme court a writ of error to obtain a review of the state courts' decision in the will construction case (under Sections 1200 and 1202, Rev. Stats. 1939,—copied in the accompanying Petition), issuable as "of course", being "a writ of right".

This was a prompt statutory remedy available to review the will construction decree, by which she could have caused said state court to promptly consider and decide all of the same contentions about the propriety of the disputed paragraph being or remaining in the will construction decree, that she seeks to make in the instant direct attack in order to have said paragraph decreed void. It was and is incumbent on her to show affirmatively that she "was free from fault or negligence" in not thus resorting to said other available and adequate remedy, or a valid excuse for not having done so, as a condition precedent to recovering in the instant direct attack on the will decree for alleged fraud in its inception and affirmance, if such fraud had existed. She made no effort to excuse her said neglect.

The above statutory right of review by writ of error sued out *within three years* was granted to litigants (like Respondent) who were *under twenty-one* and therefore could not litigate for themselves, and who, when sued, were compelled to defend by guardians at litem represented by counsel selected by the latter; *the period of three years* was allowed so that with the aid of counsel of such defendant's own and adult selection, judgments affecting them could be reviewed upon any ground appearing upon the face of the record before the state supreme court; *Spotts v. Spotts*, 331 Mo. 917, at 931 (55 S. W. 2d 977, at 983). All of the facts held in the instant case to support the decision of the state supreme court, were open upon the record and papers before it on the appeal from the will construction decree.

It is the general doctrine established by the courts in most jurisdictions, including this Court and the Supreme Court of Missouri, that:

> "To justify a court of equity in enjoining the enforcement of a judgment, *the complainant's case*—including alike the specific grounds on which he asks equitable relief, *his excuse for not making his defense in the original action, and the showing that he himself is free from fault or negligence*—must be supported by clear, satisfactory and convincing evidence, preponderating distinctly in his favor"; 34 C. J., p. 495, Sec. 782.

> "Where fraud, accident, surprise or mistake is a ground for equitable relief against a judgment, plaintiff must come into court with a cause *unmixed with his own negligence* or fault"; *Cantwell v. Johnson*, 236 Mo. 575, at 600; 139 S. W. 365, at 374.

See also *Perkins v. St. L., K. C. & Col. R. R. Co.*, 143 Mo. 513, at 519; 45 S. W. 260, at 261.

In this Court the same doctrine was stated thus, in *Knox*

County v. Harshman, 133 U. S. 152, at 154; 33 L. Ed. 586, at 588:

> "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing of by fraud or accident, *unmixed with negligence of himself or his agents.*"

See also: *Marshall v. Holmes*, 141 U. S. 589, at 596; 35 L. Ed. 870, at 873.

Mrs. Kennard attained the age of twenty-one on March 10, 1928, (Phys. Ex. *577). Her contention by her present counsel, that the disputed paragraph of the will decree was wrong in its interpretation of the will and was prejudicial to her, began at least as early as the fall of 1928, and has continued ever since. The will decree became final on April 13, 1925, (R. 180), when the state supreme court denied the daughters' motion for rehearing following the affirmance of the decree. Mrs. Kennard had three years after March 10, 1928,—until March 10, 1931,—in which to sue out a writ of error. Her counsel, also representing Mrs. McIntosh, filed the latter's first federal suit against Mrs. Wiggins on June 19, 1929.

If Mrs. Kennard had sued out a writ of error in the will construction suit, the state supreme court would have reviewed and corrected all actual errors called to its attention and made by the circuit court in the will construction decree, including an alleged erroneous interpretation of the will if it had been erroneous. Said supreme court would also, if so requested, have considered and decided whether the attorney for Mrs. Kennard's guardian ad litem had exceeded his authority in the will construction suit by filing the answer and trial brief that said court held in the instant case to have been beyond his authority; and whether or not she was bound by said answer and

brief. Said supreme court would also, if so requested, have considered and decided whether any statements made in the briefs of counsel on the appeal from the will construction decree had misled or deceived said court into affirming said decree, and if that had occurred the court would promptly have corrected any error that it found in the decree, prejudicial to Mrs. Kennard.

This quickly available remedy was a complete and adequate remedy provided by statute to protect Mrs. Kennard's rights as an infant defendant against any errors committed, or injustice done, by the will construction decree or in the will construction suit, and it was the only such remedy provided by statute. That her present counsel knew at least as early as November 25, 1930, of the statements and briefs filed in said state supreme court in the will construction suit, [from which briefs certain statements of counsel, including one statement of counsel for the daughters, were quoted in, and made (in part) the basis of, the instant decision against Mrs. Wiggins], is shown in the stipulation signed by said counsel for Mrs. Kennard (Phys. Ex. *524, 525). By neglecting said available and adequate remedy by writ of error, with knowledge of the facts upon which (in part) the instant decision is based, she *voluntarily closed against herself the right of access to equity in this direct attack on the decree to get such relief.*

Instead of availing of this statutory remedy within said three-year period, she allowed the entire time to pass without acting, until she filed the instant suit in the state court and Mrs. McIntosh filed her companion suit in the federal district court, both on March 21, 1931, just ten days after the end of said three-year period.

The contention here made was urged upon the state supreme court: in Mrs. Wiggins' motion to modify the first opinion in the instant case, (R. 285-286); in her motion for rehearing as to the second opinion, (R. 369-370); in her

motion to transfer, by reference to said motion for rehearing, (R. 380); in her motion for rehearing as to the third opinion (R. 420-423); and in her motion to transfer, by reference to said motion for rehearing, (R. 434).

Said supreme court did not rule expressly upon said contention and it is submitted that *by failing to sustain it and by denying said motions, the action of the court was arbitrary and a denial of due process.*

The following cases cited by Mrs. Kennard (R. 304) in opposition to the existence of said remedy by writ of error, as not available "to a decree in equity", nor when the judgment in question was affirmed on appeal, are not in point.

In *Anderson v. Biddle,* 9 Mo. 580 (1845), the complete opinion reads:

> "On motion it was held, that a writ of error will not lie to a decree in chancery."

Whatever the law may have been in 1845, it is no longer in effect, as shown by the above citation to *Spotts v. Spotts,* 331 Mo. 917, at 931; 55 S. W. 2d 977, at 983.

The other two cases cited for Mrs. Kennard,—*Padgett v. Smith,* 205 Mo. 122, and *Harburg v. Arnold,* 87 Mo. App. 326,—merely hold that when an adult litigant has appealed from an adverse judgment and such judgment has been affirmed for any reason, he has exhausted his full right to a review by an appellate court.

That arbitrary action by the highest court of a state, prejudicial to a litigant, constitutes a denial of due process, is established law.

Scott v. McNeal, 154 U. S. 34 at 45; 38 L. Ed. 896 at 901.

Giozza v. Tiernan, 148 U. S. 657 at 662; 37 L. Ed. 599 at 601.

Point III. The state supreme court's decision that the pleadings and proof amply support the judgment below against Mrs. Wiggins is not supported by any substantial evidence, and, being wholly arbitrary, it unlawfully deprives Mrs. Wiggins of her property without due process of law, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States.

In the companion case, *McIntosh v. Wiggins*, 123 F. 2d 316, at 321, the Circuit Court of Appeals held that the finding of the District Court in said case, "That there was no fraud, accident or mistake with respect to the insertion in the decree of the Circuit Court of the City of St. Louis," of the disputed paragraph in the will construction case, was "not erroneous."

The final opinion in the instant case does not contain even a suggestion that any actionable "fraud, accident or mistake" for which Mrs. Wiggins or her counsel were responsible, induced the insertion of the disputed paragraph into the will construction decree in the circuit court. On the contrary, the finding here is (R. 402-403, 404) that it was "*The action of the guardian ad litem, by his attorney* in going beyond any authority he had" that "*Caused a decree to be entered which limited* the *rights of his ward.*" Nor does said opinion contain any suggestion that actionable *accident* or *mistake*, caused or contributed to by Mrs. Wiggins, constitutes the basis of the instant decision against her. It was the mistake, not of Mrs. Wiggins, but of counsel for Mrs. Kennard's guardian ad litem (a mistake of law, not of fact), that the opinion found had caused such decree to be entered; and because of this mistake the opinion said that "to refuse redress in the present case 'would be a reproach to the administration of justice'" (R. 404).

Since none of the foregoing acts were done or caused by Mrs. Wiggins, the final decision for Mrs. Kennard in the

instant case is wholly arbitrary as to Mrs. Wiggins because the opinion lacks findings supported by substantial, clear and convincing evidence that prove Mrs. Wiggins or her counsel to have been guilty of *actual and extrinsic fraud* causing prejudice to Mrs. Kennard. The charge of the petition is without evidence to sustain it.

The law upon this point is firmly established in the jurisprudence of Missouri and of this Court. The opinion in the instant case does not purport to change it in Missouri.

In *U. S. v. Throckmorton*, 98 U. S. 61, at 68, 25 L. Ed. 93, at 96 (a leading case), this Court announced as the rule that:

> "The acts for which a court of equity will *on account of fraud* set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to *frauds, extrinsic or collateral, to the matter tried by the first court,* and *not to a fraud in the matter on which the decree was rendered.*"

In *Cantwell v. Johnson*, 236 Mo. 575, at 601; 139 S. W. 365, at 374, the Missouri doctrine was stated thus:

> "Fraud entitling him to relief must be fraud *arising on extrinsic matter* whereby he or the court was tricked, and the court was made an instrument of injustice. So, when he claims it to be against conscience to execute a judgment, *the injured party must clearly prove either that he could not have availed himself of his defense* in a court of law, or that he might have availed himself of it but *was prevented by fraud* or accident *unmixed with his own fault or negligence.* * * * Judgments are impeachable only *for fraud 'extrinsic to the merits of the case'.* 'They are not impeachable for fraud relating to the merits between the parties.' *All such 'mistakes and errors must be corrected from within by a motion for a new trial, or*

> *to reopen the judgment, or by appeal.'* The foregoing propositions announce settled doctrine." (Citing Missouri decisions.)

The obvious philosophy of above doctrine is that when the alleged fraud was "intrinsic",—occurred *within* the trial or *hearing on appeal,* of the case in which the attacked judgment was rendered,—the injured party can and must correct it by some other remedy than a direct attack in equity *if such other remedy is available and adequate.* A conscious neglect to do so bars relief in equity by a separate suit directly attacking the judgment.

Turning now, with above doctrine in mind, to the final opinion in the instant case, it is significant to note that while the factual and legal bases for the decision against Mrs. Wiggins are not at all clear, the only findings upon which the decision against her seems to rest, are:

(1) That in the appeal brief of her counsel, in the will construction suit, there was the statement quoted in said opinion (R. 401) that:

> *"In case a daughter should die during the trust period,* then *the remainder* of the said subject matter with which the testator was here dealing—the *equitable estate during the rest of the trust*—should go over to the heirs of the body of the deceased daughter, and in default of such heirs, then to the survivors of the daughters, again with remainders over to the heirs of their *bodies."* (Emphasis as in said brief; Phys. Ex. *362.)

For the making of the other statements quoted in said opinion from the briefs of counsel for other parties, Mrs. Wiggins is not responsible.

(2) That concerning the averments in the petition in the instant case, that "on appeal in the will construction suit counsel *did not advise* this court as to the disputed

paragraph in the decree", (R. 404), and concerning the contention that said paragraph *"was, in effect, concealed from this court* on the appeal in that case", (R. 399), the opinion said:

> "It is true that the disputed paragraph was in the will construction suit decree, and that this court *affirmed* that decree, but it is quite apparent, if not conceded, that this court's attention was *not directed* to the disputed construction, * * *", (R. 398-399, emphasis by the court); also,
>
> "Whether concealed or not, it was given but scant attention, and there *were statements in the briefs, in effect, contrary to the construction in the alleged paragraph;"* (R. 399).

(3) That "No Judge, by reading the briefs in the will construction appeal, *would even suspect such a construction as that contained in the challenged paragraph of the decree"*; (R. 401).

It is submitted that said findings or statements lack substantial evidence to support them and are inadequate in law to sustain the decision *against Mrs. Wiggins,*—for the following reasons in each instance:

(1) In quoting as above, the statement from the appeal brief of the daughters, said state supreme court inadvertently omitted the next sentence in the same paragraph, which materially alters the meaning apparently attributed to said quoted part, by said opinion. Said omitted sentence reads:

> *"And in case the daughters should survive, then they themselves would take as 'beneficiaries' under the distribution paragraph No. 13."* (Phys. Ex. *362.)

The first sentence in said paragraph dealt only with the disposal of the equitable estate of a daughter who

might die "during the trust". But no such factual situation was then before the state supreme court, because the trust had ended in 1916, and all the daughters had survived the trust period. Therefore, the second above sentence was the one that applied to the then facts, and in it the daughters merely stated their contention that they were entitled at the end of the trust period, to receive their portions of the trust estate under the distribution clause of the will *in fee simple titles*, just as the grandson had taken his portion under said clause as applied in the accounting decree. No judge reading said entire paragraph, could possibly have been deceived into thinking that the daughters were making any contention except *said single contention*, asserted in their petition (Phys. Ex. *197), recognized as such in the briefs of opposing counsel (Phys. Ex. *289), and in the opinion of the court affirming the will decree (*Wiggins v. Perry*, 271 S. W. 815 at 821). Nor can the paragraph be considered as having concealed from the court the only contention that the daughters were making about the kind of titles they were entitled under the will to have the trustees convey to them by distributive conveyances.

Mrs. Wiggins owed no duty to her adversaries or to the court, to disclose matters which might defeat the daughters' contention as to title (*First National Bank & Trust Co. v. Bowman*, 322 Mo. 654, at 674; 15 S. W. 2d 842, at 852), where the court cited as the general rule (from 34 C. J. 283):

> "*Mere failure to disclose* to the adversary, or *to the court, matters which would defeat one's own claim or defense* is *not such extrinsic fraud as will justify or require vacation of the judgment.* Actual fraud as distinguished from constructive fraud is essential."

Therefore Mrs. Wiggins owed no duty to call to the court's attention, the existence in the decree, of the con-

tention shown by the pleadings and other parts of the record to have been made on behalf of Mrs. Kennard, since that contention was entirely hostile to the contention being made by the daughters.

Pertinent to this point, the Circuit Court of Appeals in *McIntosh v. Wiggins*, 123 F. 2d 316, at 322, held and said:

> "Ella L. Wiggins cannot be charged with doing anything toward procuring the construction of the will which the circuit court of the City of St. Louis adopted when it entered its decree. *She was a losing, and not a successful party, in that litigation.*"

The Circuit Court of Appeals in its said opinion also quoted from the opinion of the Supreme Court of Missouri (271 S. W., at 826), one of the same statements quoted in the instant opinion (R. 400), from the brief of counsel for Mrs. Kennard, beginning with the words "We therefore respectfully submit",—and concerning said statement the Circuit Court of Appeals held and said (123 F. 2d 316, at 321):

> "The theory that *counsel for the minor grandchildren* of Dolly L. Kilpatrick * * * *imposed upon the Supreme Court of Missouri* in the appeal from that decree *by not calling specific attention* to *that provision* and by *making statements in his brief which might be taken to indicate that no such provision was in the decree, is not tenable.*"

This ruling applies with equal if not greater weight, to the above quoted statement from the brief of counsel for Mrs. Wiggins.

(2) The above quoted statements in the final opinion of the state supreme court in the instant case, that "On appeal in the will construction suit counsel *did not advise this court as to the disputed paragraph in the decree,*" and that said paragraph "*was, in effect, concealed from this*

court upon the appeal in that case," and that *"this court's attention was not directed to the disputed construction,"* not only lack the support of substantial evidence, but are completely contrary to the undisputed facts of record on said appeal, which show:

(a) The Abstract of Record, on the daughters' appeal from the will construction decree, contained a complete copy of the decree (Phys. Ex. *223-227);

(b) Said Abstract also contained a copy of the daughters' petition (Phys. Ex. *168-202), showing the issues presented by the daughters, and that "contingent" interests were to be adjudicated (Phys. Ex. *185);

(c) Said Abstract also contained: A complete copy of the answer filed for the guardian of Mrs. Kennard, contending on her behalf that the daughters took life estates only and that her prospective remainder would not vest until the death of the last daughter to survive; and that said answer had prayed that the Court *"so construe the will"* (Phys. Ex. *213-214); said Abstract also showed that the reply of the daughters denied the new matter in said answer — in complete hostility to the existence of any remainders (Phys. Ex. *222), thus making said contention concerning the meaning of the disputed paragraph in the will *an issue* in the case as between the daughters on the one hand and Mrs. Kennard on the other hand.

(d) The main brief for the daughters (appellants in the will construction suit) definitely informed the court: That *"the nature of the title that passed to the daughters"* was for decision, *their only contention being that they took fees, not merely life estates* (Phys. Ex. *329); that *"the only parties having substantial conflicting interests* are *the daughters of testator* on the one hand and *their own descendants* on the other hand, except that *in*

the case of Mrs. Cora B. Fowler, who has no descendants, the interests opposing her are the minor descendants of her sisters'' (Phys. Ex. *330); that the answers filed on behalf of minor descendants of Mrs. Fowler's sisters contended, in substance (Phys. Ex. *337), that the daughters took life estates only, and that the share of a daughter who might die without issue would go to the surviving daughters, in equal portions, for life, but that the remainder *would not vest until the death of the last survivor of the daughters,* and that thereupon it would pass to "the surviving issue of said daughters, share and share alike, per stirpes" (which necessarily meant that the phrase "heirs of the body" was not construed in its technical sense), and that said answers prayed the court to adjudge and determine and to construe said will (Phys. Ex. *337). The brief for the daughters also contained a copy of the paragraph of the will that disposed of the share of the grandson, John, in case he died without issue before attaining the age of thirty, by providing (Phys. Ex. *367-368) that: *"The last of my said daughters being dead, the whole of John E. Liggett, Jr.'s share* (he being dead before he arrives at the age of thirty years without issue) shall go to and become the property of the issue of such of my daughters as shall die leaving issue, to take per stirpes, * * *."

(e) The brief for Mrs. Kennard's guardian ad litem, in the will construction appeal, closed with the contention that the *"interpretation placed upon the will by the learned trial judge is strictly in accord with its true purpose and intent,"* and that *"if so, the judgment is right and should be affirmed by this Court"* (Phys. Ex. *316).

The brief for the grandson and members of his family, including his minor children (defendants), also contended that *the decree "was correct and should be affirmed"* (Phys. Ex. *435).

These contentions show that earlier statements in the same briefs, referring to the "heirs of the body" of a deceased daughter, *could not have used said phrase in the technical sense contended for herein by Mrs. Kennard.* This is so also as to the use of said phrase in other parts of the briefs. Counsel were not contending about the meaning of the will concerning the disposal of the share of a daughter who might die without issue, leaving both her sisters surviving her. In fact, it is conceded that no counsel in the case made any contention in the appeal from the will construction decree concerning that question, and said supreme court as then constituted did not have before it any arguments *pro* or *con*, on said question.

As the Circuit Court of Appeals held and said (*McIntosh v. Wiggins*, 123 F. 2d 316, at 319):

> "The questions *as to what would become of the share of a daughter having a life estate, in the event she died without issue,* and *as to when the share of such a daughter would vest in remainder* were *not in dispute, were not raised,* and, *of course, were not before the Supreme Court of Missouri on the appeal.*"

There is no evidence in the instant case that the state supreme court, as constituted in 1925, did not read the entire will construction decree; nor that it did not read said printed Abstract of Record then before it on the appeal from said decree; nor that it did not read the appellants' main brief filed therein on behalf of the daughters.

Judge Woodson, who wrote the opinion of said court affirming the will construction decree (handed down March 16, 1925), has been dead for many years. The entire personnel of Division One of said court has changed since that time. It is impossible to ascertain from living witnesses whether Judge Woodson did or did not read the above-mentioned portions of the Abstract, or whether he

did or did not read the above-mentioned portions of the brief for the daughters.

However, there is a strong presumption *(conclusive in the absence of such proof)* that the court did its duty by reading the above portions of each of those pamphlets, particularly the main brief for the appellants.

There is also *conclusive proof* that Judge Woodson *did* read said brief for the daughters, because he made extensive copies from it in said opinion affirming the will decree. A comparison of the "Statement" contained in said opinion with the "Statement" in said brief shows that most of the court's said "Statement" was copied almost verbatim from the daughters' brief, omitting paragraph captions.

Among the portions so copied was the following, of special interest here, (*Wiggins v. Perry*, 271 S. W., at 819):

> "So that, in this suit to construe the will, *the only parties having substantial conflicting interests* are *the daughters of testator* on *the one hand*, and *their own descendants* on *the other hand, except* that *in the case of Mrs. Cora B. Fowler, who has no descendants, the interests opposing her are the minor descendants of her sisters*"; (copied from the brief of the daughters, Phys. Ex. *330).

From the foregoing cumulative evidence contained in said abstract, in the brief of the daughters, and in said opinion of the court, it is indisputable that said court *was adequately informed:* that the meaning of the disputed paragraph of the will had been an issue in the circuit court; that minor defendants were interested in the determination of said issue; and that a determination of said issue in harmony with the contention made on behalf of the minor defendants, would necessarily attribute to the words "heirs of the body" the meaning thus contended

for, and would not attribute to them the technical meaning contended for by Mrs. Kennard and held by the court in the instant case to have resulted from the mandate of statutes which had no relation whatever to wills of personal property.

(3) No judge of said state supreme court, zealous as are the present members of said court, to protect the interests of minor defendants (wards of the court in chancery), having the case for decision *de novo,* and having the information above stated, would have refrained from searching the will construction decree to see what meaning it gave to the paragraph of the will thus in dispute below as between the said contention made for the minor defendants, and the opposing contention made for the daughters.

Every such judge by merely reading the main brief of the daughters, would have learned the nature of this disputed contention, and would at once, without the slightest difficulty, have found the disputed paragraph of the decree staring him in the face at three separate and prominent places in the complete copy of the decree set out in the printed Abstract of Record; (Phys. Ex. *265; *268; and *271). Said provisions followed closely after a general adjudication and decree:

> "That the daughters of said testator *take under said will life estates only,* with contingent remainders over as hereinafter specifically set forth"; (Phys. Ex. *263).

In view of the foregoing undisputed record evidence, it cannot be said that the attention of the state supreme court "was *not directed*" to said disputed issue. Nor can it be said that: "No judge by reading" the brief for the daughters "would even suspect" the presence in the decree of said disputed paragraph. We do not doubt that

Judge Woodson did examine said abstract and did carefully read the main brief for the daughters on the appeal from the will decree. Having done so, the conclusion is unavoidable that he read said disputed paragraph, and that if he had considered the interpretation of the will therein expressed to have been erroneous, he would have caused the disputed paragraph of the decree to be modified. The fact that he did not, argues persuasively that Judge Woodson and his associates on said bench thought the construction right. The trial judge (Hon. Franklin Miller), regarded by counsel as "One of the ablest judges on our circuit bench" (Phys. Ex. *316), thought it was right because he examined the draft of decree, signed it, and caused it to be entered of record (R. 136). He had practiced law for eighteen years before becoming a judge (R. 135).

It should be noted that there is no evidence in the record of the instant suit tending to prove that Judge Woodson did not know the above facts contained in said record and pamphlets on said appeal. Nor is there any direct evidence that either he or his associate judges *were in fact deceived or misled* by the quoted statements from the briefs of counsel on the appeal from the will construction decree. The decree of the state circuit court in the instant case did not make any specific finding that the affirmance of the will decree had in fact been induced by any fraud upon the state supreme court. Nor did said supreme court expressly find or hold in its instant decision that said statements contained in, or omitted from, the briefs of counsel *did in fact* mislead the court into affirming, or refraining from modifying, the will decree with the disputed paragraph in it.

And since said court in its opinion on the appeal in the nunc pro tunc case stated that in the will construction appeal it had not been "attempting to specifically rule" on

the disputed paragraph of the decree (*Wiggins v. Perry*, 119 S. W. 2d 839, at 844), it is evident that said court must have thought the decree correct, and therefore made no specific ruling upon the disputed issue, but left the paragraph undisturbed by entering a general affirmance. The daughters as defeated litigants and appellants in the will construction suit, did their full duty to inform the state supreme court concerning the pleadings and issues in the case, to the extent shown by the portions of the abstract and daughters' brief above mentioned.

In any event, it is clear that the state supreme court predicated its decision in the instant case against Mrs. Wiggins upon a mere assumption and surmise (without substantial evidence to support it and contrary to the undisputed evidence), that said court was in fact deceived or misled by said statement quoted from the brief for the daughters, into affirming, rather than reversing or modifying, the disputed paragraph of the will decree. There is no law, either state or federal, that supports or sanctions a direct attack upon a judgment, based upon mere surmise or assumption, as distinguished from clear, positive and convincing evidence that the court was in fact misled or deceived into entering or affirming the judgment.

We quote again from the opinion of the United States Circuit Court of Appeals (123 F. 2d 316, at 321-322):

> "So far as the charge that the Supreme Court of Missouri was imposed upon is concerned, *it is enough to say that the challenged provision of the decree was not questioned in that court by any of the parties to the appeal and was not an issue on appeal.* If that court had wished to make an independent investigation of the correctness of each provision of the decree, it could have done so *on the record before it, which contained all essential data. We are satisfied that there is no factual basis to support a conclusion that the*

challenged provision of the decree of the Circuit Court of the City of St. Louis resulted from fraud or from any accident or mistake that would permit a court of equity to relieve the appellant from the effect of the provision complained of.''

Since the findings upon which the instant opinion based its decision against Mrs. Wiggins are without evidence to support them, and are contrary to the indisputable written evidence of record, and are clearly inadequate in law to support the decision evidenced by said modified opinion herein, we respectfully submit the decision is wholly arbitrary as to her, and Petitioner therefore was unlawfully deprived of her property without due process of law, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States.

Point IV. Said court denied to Petitioner such ''due process of law'':

(1) *By arbitrarily and unjustly penalizing her by its instant decision and judgment, for the acts of the attorney for the Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state circuit court to construe the will in harmony with said affirmative contention,—acts for which Petitioner was not responsible in any way;*

(2) *By arbitrarily and unjustly penalizing her for the long delay that was caused chiefly by Respondent's having neglected to sue out a writ of error within the time allowed by statute and was also caused by the institution and prosecution of said futile litigation in the nunc pro tunc case, and in the two McIntosh suits in the federal courts;* and

(3) *By arbitrarily and unlawfully holding, contrary to the law and the undisputed evidence, that said guardian ad litem of Mrs. Kennard, by his attorney, in making*

said affirmative defense, "went beyond any authority he had" and *thereby caused a decree to be entered which limited her "rights"* (R. 404) *and by thereupon treating said holdings as a basis for the instant decision against Mrs. Wiggins.*

Upon reading the three opinions herein of the state supreme court, the conclusion seems probable that because said court's first impression was that an infant defendant had been defrauded by the will decree—the court determined, quite properly, to search the record for a basis on which it could validly grant relief, although its jurisdiction to do so was limited by the petition to a decision that actionable fraud, accident or mistake, *caused by Mrs. Wiggins*, had *resulted in the alleged prejudice to Mrs. Kennard.*

Under the challenges of motions filed for Mrs. Wiggins and of "Suggestions" of the *amicus curiae*, but "of its own motion," the court apparently abandoned the ground of actual fraud, and turned in its first modified opinion, to "constructive fraud," as the basis of its decision; at the same time it greatly enlarged its ruling as to the scope of the authority of the guardian ad litem of a minor defendant, beyond the strict confines indicated in its original opinion.

Again challenged,—that constructive fraud, even if proved, is not a valid ground for setting aside a judgment,—the court deleted that finding and based its final decision on the stated grounds: that "the challenged paragraph in the will construction suit, under the facts, *wrongfully deprived* a minor defendant * * * of the possession of the property and income therefrom * * *," (R. 404-405); and "that the action of the guardian ad litem, by his attorney, in going beyond any authority he had, *caused a decree to be entered* which limited the rights of his ward," (R. 404).

It should be noted that in reaching the latter conclusion, the court neither distinguished nor overruled its own decisions in *Spotts v. Spotts,* 331 Mo. 917, at 921, 924, 930-931, 932; 55 S. W. (2d) 977, at 978, 980, 983-984, and in *Fiene v. Kirchoff,* 176 Mo. 516, at 522, 526-527; 75 S. W. 608, at 609-611,—in each of which cases guardians at litem for minor defendants had made affirmative contentions about the construction of conveyances affecting property in which their wards had interests,—and their conduct in doing so was judicially sustained, *treated as valid without any challenge of their power to make such defenses;* (see Petitioner's "Motion to Modify", R. 277-280). This abrupt departure from the established doctrine and practice of the court was arbitrary.

In its final opinion the court stated concerning the power of a guardian ad litem for an infant defendant in a will construction suit, that "it is entirely proper * * * to contend for any reasonable construction favorable to his ward, and where there are two possible constructions, it would be his duty to contend for the one most favorable to his ward"; also "a guardian ad litem for a minor defendant is more than a mere figurehead, and the office is not merely perfunctory, and his duties are not shadowy"; he *"should do for his ward 'what with riper judgment he would do for himself' ";* (R. 402). Also: "Clearly, the duty of the guardian ad litem was to contend for the reasonable construction *most beneficial to his ward under all the circumstances,* and *he had no authority to do otherwise";* (R. 403).

The performance of the above sanctioned duties of a guardian ad litem clearly contemplate the exercise of a reasonable discretion and he is within his recognized powers if he does for his ward "what with riper judgment he would do for himself". This is precisely what the guardian ad litem for Mrs. Kennard, acting through his

attorney, did on her behalf; see his "suggestions" (R. 289-292; 382-384). His complete good faith in acting as he did is not challenged, but is expressly recognized in the opinion; (R. 404-405). He was an able and experienced lawyer, recognized by the opinion to have had a "long and honorable career". That he had made a careful study of facts and law in the case, is demonstrated by the fact that the state supreme court in deciding the only contention made for the daughters in the will construction case, made copious quotations from his brief, and adopted his language in the reasons assigned by the court for the decision defeating the daughters' claim to fee titles. In drafting the form for decree he had to comply with the prayer in the daughters' petition that if the court should hold them entitled to mere life estates, they be judicially instructed concerning "the nature, extent, conditions and limitations of the estate vested" in them; (R. 290-291; Phys. Ex. *201). The trial court having adopted said attorney's contention that the daughters took life estates only, and not having instructed him further concerning the court's view of nature and extent of such life estates, he assumed (quite properly) that the court had also adopted his contention on that issue made by the pleadings. That he entertained in good faith this view of the intent of the will, is evidenced by the fact that he had expressed it in his said answers and in his trial brief, long before the trial court had announced its conclusion on the issue of fee titles versus life estates. Under commission by the court, he had to construe the will as to the nature and extent of the life estates, that is, whether, upon the death of a daughter without issue leaving both her sisters surviving her, the life estates would be successive, and therefore whether the last life estate would end only at the death of the last daughter to survive, or whether some other interpretation should be stated (R. 291). His professional integrity and duty to the court compelled him to insert into the form of a

decree the meaning on this point that he sincerely believed was the correct intent of the will. So he did exactly what the court in its instant opinion described as within his lawful authority, by exercising on behalf of the ward the same judgment, and by doing for her what with riper judgment he would have used and done for himself.

All the daughters were living and married. Both Mrs. Kilpatrick and Mrs. Wiggins had a child or children, but Mrs. Fowler had none. Under these circumstances he drew the disputed paragraph in accord with his professional opinion (stated in his answer and brief) concerning the expressed intent of the will and also giving exactly the same contingent benefits to Mrs. Kilpatrick and to Mrs. Wiggins in the Fowler portion in case they should survive her and she should leave no issue. If Mrs. Wiggins had predeceased Mrs. Kilpatrick the latter would during the rest of her life have received under the disputed paragraph the income of the same portion of the Fowler portion here in dispute and to which the federal courts have twice held Mrs. Wiggins entitled.

In its opinion in the first McIntosh case, the federal district court said (Phys. Ex. *530):

> "At the time the state court suit was pending, *it could not have been known* that Mrs. Fowler would be the first of the three daughters of the testator to depart this life; nor could it then be known that plaintiff's mother, Mrs. Kilpatrick, would be the next to die. If Mrs. Wiggins, defendant here, had predeceased *Mrs. Kilpatrick, the latter,* under the decree of the state courts, *would, under defendant's present contention, then have taken the identical life estate, now here claimed by the defendant.*"

Since obviously it could not have been known, the attorney for Mrs. Kennard's guardian, by his contention, gave to Mrs. Kilpatrick and Mrs. Wiggins *equal chances* to become the owner for the rest of her life of the same

portion of the trust income from the Fowler portion, here in dispute.

But the instant opinion holds in effect that said attorney should have had prophetic vision and should not have given any such chance to either of the sisters surviving Mrs. Fowler, but should have caused the will decree to provide, contrary to his own legal opinion and contrary to his understanding of what the trial judge intended, that the life estates of Mrs. Kilpatrick and Mrs. Wiggins, surviving Mrs. Fowler and in her trust portion, *would not be successive.* This was arbitrary treatment. The undisputed record facts failed to provide a substantial basis for a finding of fraud.

The Circuit Court of Appeals so held in the second McIntosh case (*McIntosh v. Wiggins*, 123 F. 2d 316 at 321), saying:

> "*There could have been no fraudulent purpose* in *inserting in the decree the provision complained of.* No one could have known, at the time the decree was entered, in what order the daughters of John E. Liggett would die. If Cora B. Fowler had been the last of them to die, the provision would not have made the slightest difference to anyone. If Dolly L. Kilpatrick had died before Cora B. Fowler, the appellant would not have been prejudiced by the provisions; and if Dolly L. Kilpatrick had been the last to die, the appellant could not have been hurt. *The circumstance that Cora B. Fowler died without issue before her sisters, and that Ella L. Wiggins outlived Dolly L. Kilpatrick, does not offer a substantial basis upon which to predicate an inference that the provision of the decree which appellant challenges was inserted through fraud, accident or mistake.*"

Moreover, the opinion was arbitrary also in treating said attorney, rather than the trial court, as legally responsible for the presence in the will decree of the disputed paragraph, although the trial judge had testified

that he examined the draft of decree, signed it, and handed it to the clerk for filing (R. 136), and said attorney had informed the court as *amicus curiae* that the trial judge "went over the decree thoroughly and adopted it as the decree of the court" (R. 290).

In law, it was *the court's* decree, adopted and entered as such with full knowledge by the trial judge of the issue made by the pleadings and trial briefs as between the daughters claiming fee titles and the minor defendants claiming contingent remainders following life estates in the respective daughters.

With the foregoing undisputed facts before the state supreme court in the instant case its decision is arbitrary in holding that the act of said attorney was unlawful and in their visiting on Mrs. Wiggins the consequence of said conduct, for which she was not responsible.

Point V. The raising of the federal question was timely, although not raised until the case reached the state supreme court, because:

(a) The suit being in equity, on the appeal said supreme court took it for consideration and decision, and decided it *de novo,* upon the record (pleadings and evidence) below. *Aden v. Dalton,* 341 Mo. 454, at 467; 107 S. W. (2d) 1070, at 1077, and cases cited.

(b) The primary rulings upon which said supreme court based its decision *de novo* against Mrs. Wiggins, giving mandatory legal effect to the quoted state statutes, excluding the intent of the entire will, were new in said decision of said supreme court, no such express or reasoned rulings having been made in the court below.

Said final decision was new also in that it avoided as between Mrs. Wiggins and Mrs. Kennard, and upon a petition charging fraud, accident or mistake, the paragraph in a decree rendered June 22, 1923, that entitled

Mrs. Wiggins to the disputed income, and said final decision did so although a comparison of it with the same court's two earlier opinions in this same case and on the same appeal, shows clearly that the court finally: held that there *was no actual fraud; withdrew its suggestion of constructive fraud;* made *no holding or ruling that Mrs. Wiggins was responsible for any accident or mistake* causing the disputed paragraph to be in the will construction decree, but held that unauthorized acts *of the attorney for Mrs. Kennard's guardian had caused it* to be there; and *made no express finding* or ruling that *the statement made by Mrs. Wiggins' counsel* (or any other counsel) in their briefs upon the appeal from the will decree *had in fact misled the then judges of the court to either affirm the will construction decree or to refrain from modifying it in accordance with Mrs. Kennard's present contentions.*

The other and supplemental rulings by said supreme court, that formed the further basis of its decision against Mrs. Wiggins in the instant case, were also made by said supreme court in its decision *de novo* upon the appeal in the instant case.

Said decision was a complete surprise to counsel for Mrs. Wiggins, in view of the facts: that the same division of said state supreme court had affirmed the will construction decree, and in its opinion in the later appeal in the *nunc pro tunc* case had stated that it had intended to affirm it; and upon the fact that in the instant case neither the decree of the court below nor the decision of said supreme court contained any express holding that the judges who had constituted said supreme court at the time the will construction decree was affirmed, had in fact been deceived by the statement of counsel for Mrs. Wiggins in their brief upon the appeal from the will decree, which statement is quoted in the opinion of said court in

the instant case, as a basis for its decision against Mrs. Wiggins.

(c) Her motions for rehearing, and motions to transfer the instant case to said court in banc, constituted her earliest opportunity to raise the federal question in respect of said decisions *de novo. Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U. S. 313, at 319-320; 74 L. Ed. 870, 875, 876; *Saunders v. Shaw,* 244 U. S. 317, at 320; 61 L. Ed. 1163, 1165-1166.

Therefore, the raising of the question was timely.

Point decided by the state supreme court but not argued here.

Recognizing the power of the state supreme court to adopt local rules for the construction of wills and aware that this Supreme Court of the United States has long treated doctrines governing the construction of wills (even those conveying personal property only) as matter local to the states, it is deemed inappropriate in support of the instant Petition for a Writ to here repeat at length a contention (believed to be valid) made for Mrs. Wiggins in said state supreme court and through all her litigation with Mrs. Kennard and Mrs. McIntosh, to the effect that the disputed paragraph in the will construction decree was a correct interpretation of the intent of the Liggett will,—because: (a) Neither of the Missouri statutes quoted in the instant opinion (Section 563, R. S. Mo., 1939, concerning "devises" of "real estate", and Section 3500, R. S. Mo. 1939, which defines the term "heirs of the body" of a person to whom is conveyed a remainder in real estate following a life estate) has any such direct or mandatory effect as the instant opinion of the state supreme court gives them in construing the Liggett will; (b) Said Section 563 expressly relates to devises of real estate, and said Section 3500 was enacted for the purpose of abolish-

ing in Missouri the "Rule in Shelley's case" which dealt only with "conveyances" of real property, and if said Rule is "resorted to in connection with personal property, it is only by way of analogy and *as a rule of construction in order to promote the intention*"; (*De la Vergne Refrigerating Machine Co. v. Featherstone*, 147 U. S. 209, at 222; 37 L. Ed. 138, at 142); and (c) The Liggett will conveying personal property only, if construed as a whole, clearly expresses the intent that the words "heirs of the body" were not intended to have the technical meaning given them by said statutes if applied to a conveyance of real estate, consequently the interpretation of the will as expressed in the disputed paragraph of the will decree, was right and therefore, Mrs. Kennard was not prejudiced by the presence of said disputed paragraph in said will decree.

A condensed argument on the above point (with authorities) will be found in Mrs. Wiggins' first motion for rehearing in the instant case (R. 256-271), supplemented by an explanation made by counsel who represented the guardian of Mrs. Kennard in the will case, of the legal grounds for his contention about the meaning of the will expressed in the disputed paragraph of the will decree, and contained in his "Suggestions" and "Supplemental Suggestions" filed in the state supreme court by him as *amicus curiae*, in the instant case (R. 292-297; 384-386).

Conclusion. The foregoing facts, authorities and argument are respectfully submitted in support of Petitioner's prayer that this Honorable Court grant a writ of certiorari in the instant case.

Respectfully submitted,

HARRY W. KROEGER,
DANIEL N. KIRBY,
Attorneys for Petitioner.